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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

BALTIMORE AND OHIO RAILROAD COMPANY, *et al.*,
Appellants,

v.

UNITED STATES OF AMERICA, *et. al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS

This is an appeal from a judgment below denying appellants' motions for an interlocutory injunction to enjoin orders of the Interstate Commerce Commission permitting immediate consummation of the Penn-Central merger. This brief, filed pursuant to the Court's order of October 18, 1966, is submitted on behalf of the following appellants: The Baltimore and Ohio Railroad Company (B&O), The Central Railroad Company of New Jersey (CNJ), The Chesapeake and Ohio Railway Company (C&O), Norfolk and Western Railway Company (N&W), Reading Company (Reading), and Western Maryland Railway Company.[1]

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[1] Other abbreviations which appear in this brief are as follows: Boston and Maine Corporation (B&M), The Delaware and Hudson Railroad Corporation (D&H), Erie-Lackawanna Railroad Company (E-L), New York, New Haven & Hartford Railroad Company (New Haven), New York Central Railroad Company (Central), and Pennsylvania Railroad Company (Penn).

OPINIONS BELOW

The majority and dissenting opinions of the three-judge United States District Court for the Southern District of New York are not yet reported. Copies of the opinions are printed in appellants' Jurisdictional Statement as Appendix A. The report and order of the Interstate Commerce Commission, dated April 6, 1966, are reported at 327 I.C.C. 475. The report and order of the Interstate Commerce Commission on reconsideration, dated September 16, 1966, are printed in appellants' Jurisdictional Statement as Appendix B, and are reported at 328 I.C.C. 304. The Commission's further order dated September 29, 1966, setting hearings in these proceedings is printed in the Jurisdictional Statement as Appendix C.

JURISDICTION

This suit was brought under Title 5, U.S.C. § 1009, and Title 28, U.S.C. §§ 1336, 2284 and 2321-25, to set aside in part an order of the Interstate Commerce Commission dated April 6, 1966, as modified by its order dated September 16, 1966, and to obtain injunctive relief. Pursuant to Title 28, U.S.C. § 2325, a three judge district court was convened. The order of the district court, denying motions for an interlocutory injunction, was entered on October 4, 1966. Notice of appeal was filed in that court on October 6, 1966. The jurisdiction of the Supreme Court to review this order by direct appeal is conferred by Title 28, U.S.C. §§ 1253 and 2101(b).

QUESTIONS PRESENTED

1. Whether Section 5(2) of the Interstate Commerce Act requires that the Commission determine the legality and propriety of essential conditions to a merger before the merger is consummated?

2. Whether the district court erred in assuming, before the Commission considered the problem, that it will be possible to protect railroads adversely affected by the Penn-Central merger without seriously injuring other railroads?

3. Whether the district court erred in holding, on the theory it could compel the Commission to adopt particular protective conditions, that the immediate consummation of Penn-Central would not deprive appellants of effective judicial review of the protective conditions to be devised after consummation?

4. Whether the district court erred in substituting its own grounds to justify immediate consummation of the Penn-Central merger after holding that the ground relied upon by the Commission itself could not be sustained?

5. Whether the Commission failed to make adequate findings with respect to the adverse effects of Penn-Central upon other railroads when it rescinded essential protection initially afforded those railroads without explaining its change of position?

STATUTES INVOLVED

The principal statutes involved in this case are: Sections 5(1), 5(2) and 5(9) of the Interstate Commerce Act (49 U.S.C. §§ 5(1), 5(2), 5(9)); and Section 8(b) of the Administrative Procedure Act (5 U.S.C. § 1007 (b)). The text of these statutes is set out in Appendix D of appellants' Jurisdictional Statement.

Present Shares of Eastern Railroad Market

	Railway Operating Revenues (1965)[2]	
	Dollars (Millions)	Percent of Total
PROPOSED PENN-CENTRAL SYSTEM (shown in Map Appendix A):		
Pennsylvania Railroad system	$ 987.2	25.8%
New York Central Railroad system	759.1	19.8
New Haven	121.4	3.2
Total Penn-Central system	$1,867.7	48.8
PROTECTED CARRIERS (shown in Map Appendix B):		
Erie-Lackawanna	$ 231.7	6.1
Delaware and Hudson	43.2	1.1
Boston and Maine	64.8	1.7
UNPROTECTED CARRIERS[3] (shown in Map Appendix C):		
Norfolk and Western system	602.0	15.7
Chesapeake & Ohio-Baltimore & Ohio system	810.9	21.2
Reading	105.2	2.7
Central Railroad Company of New Jersey	53.8	1.4
Western Maryland	50.9	1.3
Total Outside Penn-Central system	$1,962.5	51.2
Total Eastern railroad market	$3,830.2	100.0

[2] As shown in reports filed with the Commission by the carriers and made a part of the administrative record in this proceeding.

[3] The Chicago & Eastern Illinois Railroad Company, also shown in Map Appendix C, is located at the western edge of the area. The Commission has approved control of C&EI by a western railroad (Missouri Pacific), with one of its lines to be operated by a southern railroad (Louisville & Nashville). See Nos. 687, 688 and 689, October Term, 1966.

STATEMENT

This is an action to enjoin consummation of the merger of the Pennsylvania and New York Central railroads unless and until the Commission decides what provision should be made for the preservation of the service provided by other railroads serving the Eastern railroad market.

The groups of railroads concerned, together with their present shares of railway operating revenues, are set forth in the table on the opposite page.

The first group of railroads (Penn, Central and New Haven) constitute the proposed Penn-Central system. The second group consists of the three carriers which the Commission found would be seriously injured by a Penn-Central merger and should be the beneficiaries of special protective conditions. The remaining group, appellants herein, are the unprotected Eastern carriers.

Several of the protected and unprotected carriers are in serious financial condition. Reading has incurred deficits in four of the last five years. Erie-Lackawanna, Boston and Maine and the Central Railroad Company of New Jersey have not realized earnings sufficient to cover the full interest on their debt in any year since the mid-1950s. CNJ, providing extensive freight and suburban passenger service in Northern New Jersey, is on the brink of bankruptcy. CNJ has had deficits for the past eight years averaging $5½ million per year, and its deficit for the most recent 12-month period grew to $7½ million.[4]

Three maps, showing the proposed Penn-Central system, the protected carriers and the unprotected carriers, respectively, are attached to this Brief as Appendices. As shown

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[4] Affidavit of James L. Barngrove, Jr., dated September 12, 1966, p. 4.

in the maps and table, Penn-Central would cover the entire East and start with nearly half of the railroad business in the East.

Penn-Central is the third major Eastern railroad unification approved by the Commission in recent years, but it differs from its predecessors in that the operating savings and the ability to offer single-line service throughout the East resulting from a Penn-Central merger would cause a shifting of traffic routing patterns which would seriously damage other railroads. In the *C&O-B&O* case, the Commission found that the transaction would not injure other railroads.[5] In the *N&W-Nickel Plate-Wabash* unification, no other railroad was injured, and the Commission expressly found that the transaction "should prove a boon to the Delaware and Hudson, and Boston and Maine, as well as the Erie-Lackawanna."[6] In contrast, the Penn-Central merger, with its huge size and territorial coverage, would inflict serious damage on other Eastern railroads until they also can become part of a railroad system able to offer competitive single-line service. The extent of this injury and efforts to protect against such injury were the center of the controversy before the Commission and in the court below.

The Proceedings before the Commission.

Pennsylvania and New York Central filed their application for merger on March 9, 1962. Hearings began in August, 1962. The Commission's Examiners issued their report on March 29, 1965.

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[5] *Chesapeake & Ohio R. Co.—Control—Baltimore & Ohio R. Co.*, 317 I.C.C. 261, 284 (1962), upheld *sub nom. Brotherhood of Maintenance of Way Employees* v. *United States*, 221 F. Supp. 19 (E. D. Mich. 1963), aff'd, 375 U.S. 216 (1963).

[6] *Norfolk & Western Ry. Co. and New York C. & St. L. R. Co.—Merger*, 324 I.C.C. 1, 31 (1964). Prior to the consummation of this transaction in October 1964, N&W was directly controlled by the Pennsylvania (324 I.C.C. at 33).

Upon a record showing declining rail traffic and deficits in railroad earnings, the Examiners found that the Eastern railroads "more than likely will continue to experience a general decline of freight traffic" and that "their financial condition, barring substantial reduction in costs, will deteriorate further" (Ex. Rep., p. 211). The Examiners recommended approval of the Penn-Central merger, finding that "it will permit the merged company to operate more efficiently and reduce costs" and that merger "is necessary if the rail industry in the involved area is to achieve full attainment of its inherent advantage and survive in the hands of private enterprise" (*id.* at pp. 405-406).

With respect to the impact of the Penn-Central merger on other Eastern railroads, the Examiners recommended as a condition of the merger that Penn-Central include the freight operations of the New Haven railroad, upon terms subject to the approval of the Commission and the Bankruptcy Court having jurisdiction over the New Haven properties (*id.* at pp. 412-413). The Examiners did not recommend any special conditions for the protection of other carriers. The Examiners recognized that the creation of a railroad the size of Penn-Central "will undoubtedly result in a shifting of traffic patterns," but found that the losses of other railroads would be offset by "the creation of new traffic relationships between [the] non-participating carriers, their affiliates and non-aligned carriers" (*id.* at p. 305). On the basis of this theory that losses of business to a merged Penn-Central system would be offset by gains resulting from new incentives for cooperation among the remaining Eastern railroads, the Examiners concluded that "the net effect will not be detrimental to such carriers" (*ibid.*).

The Commission's Report of April 6, 1966.

In its report dated April 6, 1966, the Commission generally adopted and incorporated as its own the findings

of its Examiners (327 I.C.C. at 481-482. The Commission acknowledged that there had been a marked improvement in the earnings of Pennsylvania and New York Central (327 I.C.C. at 495), but held that business cycles must be considered and that, whether or not necessary to survival, the merger would produce benefits of improved service that more than justified the elimination of rail competition between Penn and Central (327 I.C.C. at 497-520).

With respect to the impact of Penn-Central upon other Eastern railroads, the Commission's April 6th report found that New Haven would be injured and "that this merger, without complete inclusion of NH, would not be consistent with the public interest" (327 I.C.C. at 524). The Commission required that Penn-Central agree to the inclusion of both freight and passenger operations of the New Haven as a condition of the merger (327 I.C.C. at 526-527).[7] However, the Commission did not require actual inclusion of New Haven in Penn-Central as a condition of consummation of the merger. Instead, the Commission permitted consummation of the merger before (1) Penn-Central and the New Haven trustees negotiate an agreement as to the terms and conditions for the acquisition of New Haven properties by Penn-Central,[8] (2) hearings are held before the Commission on the fairness of the terms of inclusion, and on the conditions required to protect other rail-

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[7] On the same day, the Commission permitted the discontinuance of a substantial part of the New Haven's passenger service. *New York, New Haven & Hartford Railroad Co., Trustees, Discontinuance of All Interstate Passenger Trains*, 327 I.C.C. 151 (1966). The Commission also stated that further operation of the remaining New Haven passenger service would be dependent upon the financial support of the States served by New Haven (327 I.C.C. at 524-526).

[8] Such an agreement was reached and filed with the Commission on October 27, 1966.

roads, including specifically Reading, Central Railroad of New Jersey and Western Maryland, from traffic diversions they would suffer as a result of including New Haven in Penn-Central, and (3) hearings are held before the Bankruptcy Court (327 I.C.C. at 527, 553).

The Commission departed from its Examiners' recommendations with respect to other Eastern railroads. In contrast to the Examiners' finding that the benefits of cooperation to meet Penn-Central competition would offset losses to the Penn-Central, the Commission held that three of the railroads outside the Penn-Central system (Erie-Lackawanna, Delaware and Hudson and Boston and Maine) could not withstand competition from Penn-Central (327 I.C.C. at 529, 532):

> "The service the three petitioners render their shippers is essential and the public interest dictates that it be preserved. Unless somehow protected, through inclusion herein or by some other equitable means, the petitioners would be adversely affected by the proposed merger to a serious degree and would be severely handicapped in providing required transportation to the highly industrialized areas they serve."
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> "It is doubtful that, without inclusion in a major system, these three carriers could withstand the competition of the applicants merged, and, unless they are protected during the period necessary to determine their future, we would not authorize consummation at this time, even though approving the merger."

In considering the means of protection, the Commission rejected the inclusion of these three railroads in the Penn-Central system on the ground that petitions for their inclusion in a N&W system should be determined first (327 I.C.C.

at 529).[9] The Commission next considered whether to delay consummation of Penn-Central until these petitions for inclusion were decided; the Commission held that the benefits to the shipping public should not be delayed until such decision "if conditions are imposed" to protect the three railroads pending such decision (327 I.C.C. at 531-532). The Commission thereupon prescribed a series of specific conditions designed to protect the three "protected carriers" for the interim period between consummation of Penn-Central and decision of the petitions of these railroads for inclusion in an N&W system.

Two types of conditions were prescribed. One was a series of traffic provisions designed for temporary preservation of traffic practices with respect to routes, rates, divisions and allocation of unrouted traffic (327 I.C.C. at 532, 561). The Commission was not of the view that this type of condition alone would save the traffic of these protected carriers from diversion to a merged Penn-Central system. Instead, it found that consummation of Penn-Central would attract traffic away from competing railroads, without regard to any affirmative action taken by the merged system, because of the attraction of single-line service and the additional equipment of the merged system (327 I.C.C. at 490-491).

Since the purpose of the Commission was "to prevent any loss of revenue over the three railroads as a direct result of immediate consummation of this merger" (327 I.C.C. at 532), and since the traffic conditions alone could not accomplish its purpose, the Commission proceeded to create a "unique, but simple, indemnification provision" (327 I.C.C.

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[9] The Examiners had found that "from the standpoint of competitive balance," it is "highly likely that the public interest" lies in the direction of including these three railroads in an N&W system (Ex. Rep. p. 415). The Commission also referred to these three railroads as "prospective affiliates" of N&W and C&O (327 I.C.C. at 554).

at 534). The prescribed formula was designed to guarantee each of the three protected carriers the same share of the total revenues of each railroad and Penn-Central that each had experienced prior to merger in competition with Penn and Central separately.[10]

The stated purpose of the so-called "indemnity" arrangement was to protect the Erie-Lackawanna, Delaware and Hudson and Boston and Maine against financial losses they would suffer as a result of the traffic that they would lose to the new merged Penn-Central. But the arithmetic of the formula is such that the protected carriers would also receive payments from Penn-Central as a result of the diversion of traffic from other Eastern railroads to the Penn-Central system.[11] Each of the three protected railroads is now engaged in active competition with Pennsylvania and New York Central via routes in which other Eastern railroads participate. As a result of the Commission's formula, however, these three carriers would, for the first time, have a financial incentive to route traffic away from those routes and to Penn-Central in order to increase

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[10] On the basis of the freight revenues for 1964, Erie-Lackawanna was found entitled to a share (called an "indemnity") based upon a proportion of 13.0967 percent of the total revenues of E-L, Penn and Central, the share of Delaware and Hudson was 3.2819 percent and the share of Boston and Maine 4.2578 percent (327 I.C.C. at 533). These are percentages of gross revenues. The formula also provided for conversion of the loss of gross revenues to the equivalent amount of net income which such gross revenues would represent (327 I.C.C. at 534-535).

[11] For example, assume that the 1967 freight revenues of the three protected carriers remain the same as they were in 1964 while the revenues of the Penn-Central system increased over 1964 by reason of traffic diverted to it from other Eastern railroads. The formula would reward the three protected carriers with "indemnities" reflecting not only revenues lost to the Penn-Central system by the three protected carriers, but revenues lost by other Eastern railroads (including appellants).

the "indemnity" payments. The Commission's "indemnity" arrangement thus amounted to far more than protection of the Erie-Lackawanna, the Delaware and Hudson and the Boston and Maine against losses of revenues resulting from diversions of their traffic to a merged Penn-Central system. Indeed, the "indemnity" arrangement would have created an anti-competitive community of interest between the Penn-Central system, on the one hand, and the protected carriers on the other. To the extent that the protected carriers could divert traffic from other Eastern railroads to the Penn-Central system, they could increase the amount of their "indemnities." And to the extent that the Penn-Central system could divert traffic from other Eastern railroads to the protected carriers, the amount of these "indemnities" could be reduced.

This community of financial interest created between the Penn-Central system and the protected carriers by the Commission's "indemnity" arrangement had the further effect of undercutting the Examiners' finding that the unprotected carriers' losses to Penn-Central would be offset by new traffic relationships created by the cooperative efforts of the railroads outside the Penn-Central system. Indeed, because of this community of financial interest, the unprotected carriers not only faced the prospect that traffic lost to the merged Penn-Central could not be offset by cooperation with the protected carriers, but also were threatened with additional loss of traffic as a result of the "indemnity" formula itself.

Although the "indemnity" formula prescribed by the Commission in its April 6th report had these serious effects upon the unprotected carriers, the Commission made no findings whatever concerning the impact of the prescribed formula upon those carriers. Nor had the Commission held any hearing for the production of evidence with respect to

the ramifications of the novel "indemnity" formula which had not been considered or even suggested by any party.[12]

Accordingly, the unprotected carriers petitioned the Commission for reconsideration of its April 6th report, for further hearings, and for extension of the effective date of the order permitting consummation of the Penn-Central merger. The Commission's order prescribing the "indemnity" was also challenged by unprotected carriers as a violation of the anti-pooling provisions of Section 5(1) of the Interstate Commerce Act (49 U.S.C. § 5(1)), as unsupported by findings, and as ordered without notice or opportunity to be heard with respect to the impact upon carriers not party to the "indemnity" arrangement. The unprotected carriers relied, *inter alia*, upon *Gilbertville Trucking Co.* v. *United States*, 371 U.S. 115 (1962), holding that the terms and conditions of a Commission order under Section 5(2) must be supported by findings and evidence.

The protected carriers also filed petitions with the Commission asking for strengthening of the traffic conditions, higher payments under the "indemnity" formula and seeking a "capital indemnity" under which Penn-Central would compensate them for any permanent diminution of their value resulting from loss of their traffic to a merged Penn-Central system.

The United States filed a responsive pleading stating (Reply dated August 8, 1966, pp. 3-4):

> "The Commission has a responsibility to allow interested parties a full opportunity to be heard on the issues involved in tailoring a proper remedy. And, it must show that proper standards were applied in fashioning a remedy. *Gilbertville Trucking Co.* v. *United*

[12] Counsel for the Commission conceded in the court below that the parties "did not have an opportunity for a hearing focused on this type of protective condition" (Tr. 106).

States, 371 U.S. 115 (1962). We believe that the requirements of *Gilbertville* were not met in the present case and the record must be reopened for a further hearing on the protective provisions."

Penn and Central urged that the Commission permit immediate consummation of the merger, then set for September 30, 1966, and suggested that, if the Commission desired to conduct further hearings with respect to the conditions, Penn-Central would agree to accept post-merger modification of the protective conditions "other than for capital loss" (Reply dated August 1, 1966, pp. 13-14). The response of the United States to this suggestion was as follows (Reply dated August 8, 1966, pp. 4-5):

> "Whether such reversal of normal procedure is sound in policy or in law is open to considerable doubt. Should the Commission, despite its prior conclusion that determination of adequate protection is a condition precedent to merger, now decide to proceed in the manner proposed by Applicants, it should, at least, satisfy itself that Applicants are in fact effectively binding themselves to abide, without further litigation, by any protective conditions the Commission might impose after rehearings."

The Commission's Report of September 16, 1966.

In its report on reconsideration dated September 16, 1966, the Commission reaffirmed its earlier findings: that the Erie-Lackawanna, Delaware and Hudson, and Boston and Maine "perform essential transportation service" (J.S., App. B, p. 42), that Penn-Central would have a substantial adverse effect upon those carriers (*id.* at p. 14), that the continuation of their services is in the public interest (*id.* at p. 42), and that the protective conditions in Appendix G of the Commission's original report are "designed to preserve the beneficiary railroads' ability to remain competi-

tive with" Penn-Central (*id.* at p. 40). Upon considering the challenges to the "indemnity" formula and other protective conditions which were found to be an essential prerequisite to consummation of the merger in the April 6th report, the Commission found that "valid issues" had been raised as to various aspects of these conditions (*id.* at p. 41).

The Commission set for further hearing any consideration of the impact of an "indemnity" formula upon the unprotected carriers and the question of capital indemnities,[13] but refused to extend the September 30th effective date of its order permitting immediate consummation of the Penn-Central merger (*id.* at pp. 43-44). The Commission ordered that, pending the further hearings, all provisions relating to the "indemnity" payments be "rescinded," but that any provisions "for the payment of indemnities will be made applicable retroactive to the date the merger is consummated" (*ibid.*). The Commission emphasized that "consummation of the merger will not foreclose or limit court review of any decision the Commission may make in regard to the capital indemnity issue" (*id.* at p. 43).

The Commission refused to consider, on a theory of laches, the claim of Reading and Central Railroad Company of New Jersey that a Penn-Central merger under current conditions would impose serious losses upon those carriers threatening their ability to provide service needed by the public (*id.* at pp. 21-25).

In considering the "Time of Consummation," the Commission first addressed itself to the question of whether

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[13] By order dated September 29, 1966, the Commission set these questions for further hearing before its Examiners on October 31, 1966 (J.S., App. C, p. 1).

consummation should be "deferred indefinitely," until the inclusion of the protected carriers "in a major rail system is accomplished or assured" (*id.* at p. 13). The Commission rejected this alternative on the ground that such a postponement, "perhaps for several years," would unduly delay the savings that would result from a Penn-Central merger (*id.* at p. 15). The Commission next referred to the inclusion of the New Haven as the decisive reason why the Commission would not consider "delay of consummation of even six or twelve months" (*id.* at p. 16).

The Commission did not consider what the consequences to the public interest would be if lawful and adequate protective conditions could not be formulated. All issues respecting the nature and amount of protection for other railroads, including the impact of such protective conditions upon appellants, were deferred to the hearings to be held after the effective date of the Commission's order allowing Penn-Central to consummate.

The Proceedings in the District Court.

Complaints were filed in the court below by the protected carriers and the unprotected carriers. The United States is the statutory defendant (28 U.S.C. § 2322) and the Commission was made a defendant. Penn, Central, and the New Haven Trustees intervened as defendants. Various public bodies and individuals intervened as plaintiffs and defendants.

As supplemented, the complaints challenged the lawfulness of the Commission's order of September 16th permitting immediate consummation of the Penn-Central merger. In view of the September 30th effective date of the Commission's order, plaintiffs and intervening plaintiffs applied for an interlocutory injunction and their application was heard by the statutory three-judge court on September 21, 1966.

At the hearing, a temporary restraining order was entered enjoining consummation of the Penn-Central merger pending determination of the applications for interlocutory injunction. On October 4, 1966, the court below denied the applications for interlocutory injunction, one judge dissenting.

It was recognized by the court below that the basic issues raised by the complaints "are questions of law which can be decided quite as well on preliminary as on final hearing" (J.S., App. A, p. 19), and the court undertook to decide these questions. The majority of the court below thereupon sustained the validity of the Commission's order permitting immediate consummation of the Penn-Central merger and denied all motions for injunctive relief.

Upon appeals to this Court and applications for stay, this Court entered its order of October 18, 1966, staying the Commission's order and setting an expedited schedule for briefing and argument.

SUMMARY OF ARGUMENT

The threshold issue in this case is whether the Commission may lawfully permit immediate consummation of the Penn-Central merger, with its conceded substantial impact upon other Eastern railroads, before it decides what protection will be afforded the other Eastern railroads, and before it even considers whether adequate protection is feasible.

The Interstate Commerce Act requires that the Commission consider the effect of a merger transaction upon other railroads, and also requires that the Commission determine the conditions which should be imposed upon a merger to protect the public interest in the continued service of other railroads (49 U.S.C. § 5(2)). Formulation of essential conditions is required prior to consummation of a merger because that is the only way the Commission can perform its statutory duty of determining whether the

merger, as conditioned, is in the public interest. No such determination having as yet been made, the Commission's order permitting immediate consummation of the Penn-Central merger is unlawful.

The Commission's failure to face the problems caused the remaining Eastern railroads by the Penn-Central merger is especially serious because it is probable that, after Penn-Central is consummated, these problems cannot be resolved consistently with the public interest. The only means yet suggested by the Commission for protecting other carriers creates irreconcilable conflicts between Erie-Lackawanna, Delaware and Hudson and Boston and Maine, on the one hand, and appellant unprotected carriers, on the other hand, since it establishes distinct financial inducements for Penn-Central and the three protected carriers to cooperate in diverting traffic from appellants. Both the Commission and the court below recognized the need for a hearing on this question. Nevertheless, both have prejudged the outcome of this hearing by allowing Penn-Central to consummate on the unsupported assumption that all conflicting interests can be reconciled consistent with the public interest. But it is entirely possible, if not likely, that the record in the further hearing will show that lawful protection cannot be devised because, if Erie-Lackawanna, Delaware and Hudson and Boston and Maine can only be protected at the expense of impairing appellants' ability to provide needed service, the public interest must suffer. By permitting Penn-Central to consummate, the Commission has boxed itself in. Even though it might be determined, after a hearing, that the best and only feasible course would have been to defer the consummation of Penn-Central, this alternative will have been foreclosed.

By permitting the Commission to postpone the fashioning of protective conditions, the district court has deprived appellants of effective judicial review of those conditions. Once Penn-Central is consummated, a reviewing court will

be powerless to protect other Eastern carriers from its impact. If the Commission should fail in fashioning adequate protection or if the conditions adopted should be held to be unlawful, the injury inflicted by a merged Penn-Central will be irreparable. In ruling that this could not occur because, even if the Commission failed, the court itself could direct the appropriate remedy, the district court clearly erred because its ruling assumes that the court could usurp functions exclusively entrusted to the administrative agency. *FPC* v. *Idaho Power Co.*, 344 U.S. 17(1952).

The court below also misconceived its reviewing role when it held that the injuries caused appellant unprotected carriers did not constitute an "unwarranted legal injury." Since the Commission had never considered what effects its approval of the Penn-Central merger would have upon these appellants, it was clearly improper for the court below to prejudge what a hearing on this issue would show. The Interstate Commerce Act entrusts to the Commission the task of appraising the ramifications of merger proposals upon other railroads. By presuming, before the Commission had even undertaken such an appraisal, that appellants would not suffer "unwarranted legal injury," the court below deprived appellants of a fair hearing on a record yet to be made before the Commission.

The district court also erred by failing to observe the fundamental administrative law principle that agency action must be supported, if at all, on the grounds stated by the agency. For the Commission, the decisive reason for permitting Penn-Central to consummate was the need to find an immediate solution to the problems of the New Haven. The district court properly and unanimously rejected this reason, because the record is clear that even if Penn-Central were permitted to consummate, the New Haven could not be included for several years. But in rejecting

the Commission's crucial reason for allowing the premature consummation of Penn-Central, the court did not set aside the Commission's order. Instead, it relied upon reasons of its own, not the subject of any findings by the Commission. In substituting its own reasons for those of the Commission, the court below clearly erred. *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156 (1962); *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947).

Finally, the district court erred by failing to enforce the requirement of Section 8(b) of the Administrative Procedure Act that reasons and findings be stated by the Commission with respect to all material issues. The Commission's September 16th report contains no findings as to how the carriers outside the proposed Penn-Central system are to be protected. Even if the Commission has the power under Section 5(2) of the Interstate Commerce Act to defer the determination of essential issues, it must face the implications of such postponement by making findings as to the feasibility of resolving these issues and as to the effect of any failure to resolve them upon the public interest. The problem is especially serious in this case because the Commission first found, in its original report, that it would not allow Penn-Central to consummate before this protection has been fashioned and no explanation is given by the Commission for its change of mind. Thus, the Commission has not only violated Section 8(b) of the Administrative Procedure Act by failing to make all the necessary findings, but it has also created doubts as to the findings it has made by changing its position without explanation.

ARGUMENT

I. THE COMMISSION VIOLATED SECTION 5(2) OF THE INTERSTATE COMMERCE ACT BY FAILING TO CONSIDER ESSENTIAL TERMS OF THE PENN-CENTRAL MERGER BEFORE APPROVING ITS CONSUMMATION.

Section 5(2)(b) of the Interstate Commerce Act (49 U.S.C. § 5(2)(b)), which governs Commission action in passing upon merger applications, provides:

> "If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: . . ."

Section 5(2)(b) expressly states that the Commission must set out the "terms and conditions . . . found to be just and reasonable." Plainly, this requires the Commission to determine such terms and conditions *before* it approves and authorizes a merger transaction. Such a procedure is necessary to the ultimate requirement imposed by Section 5(2) that the Commission must find the whole transaction, including "such terms and conditions and such modifications as it shall find to be just and reasonable," to "be consistent with the public interest." In order to determine that a merger package is consistent with the public interest, the Commission must consider all the essential elements of that package. Section 5(2) thus does not permit the Commission to approve and permit the consummation of a merger before the essential conditions to which the merger is to be subject have been formulated and a finding has been made that the

merger, as so conditioned, is consistent with the public interest.[14]

The effect of a railroad merger on other railroads has been expressly specified by Congress as one of the prime considerations affecting the public interest. The statute which governs the Commission's action plainly states that consideration shall be given to "(1) the effect of the proposed transaction upon adequate transportation service to the public" and "(2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction" (49 U.S.C. § 5(2)(c)). The Commission has the "duty . . . to consider the effect of the merger on competitors and on the general competitive situation in the industry . . ." *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 87 (1944).

It is the Commission's responsibility to determine whether merger applications are in the public interest. It must weigh the advantages and disadvantages of a merger transaction, *as conditioned*, both from the standpoint of other railroads that might be affected and from the standpoint of the effect upon competition. In this case, the Commission has not exercised this function because it has not as yet formulated conditions to the merger transaction which are admittedly essential. Until these conditions are determined, it is impossible to know how other railroads will be affected.

The Commission's failure to consider the protection that

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[14] Quite apart from the language of Section 5(2) itself, there is a presumption that any hearing required by statute is to be had *before* agency action, not after it. See *Gonzales* v. *United States*, 348 U.S. 407, 416-17 (1955); *CAB* v. *Delta Airlines, Inc.*, 367 U.S. 316, 331 note 13 (1961).

will be afforded other railroads is a fundamental defect in its action. This is not a collateral matter which can be remedied in a subsequent proceeding under Section 5(9),[15] because Section 5(2) requires the Commission to consider these issues in determining whether the merger transaction, as conditioned, is in the public interest. The problem here does not involve the power of an agency to reconsider previously completed action and to alter such action to preserve its integrity in the face of changed conditions. *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419 (1951); *American Trucking Ass'ns, Inc.* v. *United States*, 355 U.S. 141 (1957); *American Trucking Ass'ns, Inc.* v. *Frisco Transp. Co.*, 358 U.S. 133 (1958).[16]

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[15] Section 5(9) provides in relevant part: "The Commission may from time to time, for good cause shown, make such orders, supplemental to any order . . . as it may deem necessary or appropriate" (49 U.S.C. § 5(9)). It is applicable only to orders that are necessary in the light of changed conditions, and the courts that have considered this clause have so construed it. *City of New Orleans* v. *Texas & N. O. R. Co.*, 195 F.2d 882, 886 (5th Cir. 1952); *City of New Orleans* v. *Texas & Pac. Ry. Co.*, 195 F.2d 887, 889 (5th Cir. 1952); see *Baggett Transp. Co.* v. *United States*, 206 F. Supp. 835, 842 (N.D. Ala. 1962).

[16] The court below erred in attributing a broader scope to these decisions (J.S., App. A, p. 23). The *Rock Island* case did not involve a challenge to the validity of initial agency action, as is the case here, but rather involved the power of the Commission to issue a supplemental order which was designed to maintain the policies embodied in the initial order. The *American Trucking Ass'n* case is to the same effect. The reservation of jurisdiction in that case was only to allow the imposition of conditions required "by reason of material changes in conditions or circumstances . . ." (355 U.S. at 154). *American Trucking Ass'ns, Inc.* v. *Frisco Transp. Co.*, clearly is inapposite since it only involved the power of the Commission to correct "inadvertent ministerial errors" (358 U.S. at 145).

In addition, insofar as these cases indicate a limited power in the Commission to impose supplemental conditions pursuant to a reservation of jurisdiction, that power has been severely restricted. *CAB* v. *Delta Air Lines, Inc.*, 367 U.S. 316, 333 (1961). Indeed, in *Delta Air Lines*, this Court specifically held, despite a reservation of jurisdiction by the administrative agency, that summary modi-

Nor does this case involve discretionary action by an agency in separating various segments of a problem after making findings that such segments are not essential conditions to the merger and that separate decision is consistent with the public interest.[17] Separate decision is not even possible here, for the Commission has not yet even found that the protection of other Eastern railroads, which the Commission itself found to be an essential prerequisite to the merger in this case, would be feasible after consummation of Penn-Central. It is entirely possible, if not likely in this case, that neither adequate nor lawful protective conditions can be devised that are consistent with the public interest (as is more fully discussed at pp. 27-33, *infra*).

The issue here thus goes to the very heart of the Commission's action in postponing the consideration of issues essential to the approval of the Penn-Central merger while nevertheless permitting consummation of that merger. Since the Commission has failed here to determine conditions which are essential to the basic Penn-Central merger transaction the Commission's action is a plain violation of Section 5(2) of the Interstate Commerce Act.

A comparable situation was before the court in *Scenic Hudson Preservation Conference* v. *FPC*, 354 F.2d 608 (2nd

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fication of a certificate of convenience and necessity was improper. The court below misread the facts in *Delta Air Lines* in saying that it was "wholly irrelevant" because it dealt with an attempt "to alter certificates without such reservation" (J.S., App. A, pp. 23-24). The opinion of this Court makes it plain that the CAB had purported to reserve jurisdiction (367 U.S. at 319, 321). In view of this precedent, the attempted reservation of jurisdiction in this case cannot be viewed as a source of authority for deferring the resolution of conditions which the statute makes essential to the Commission's approval.

[17] This was the situation in *Norfolk & Western Ry. Co. and New York, C. & St. L. R. Co.—Merger*, 324 I.C.C. 1, 27, 31 (1964), in which the Commission expressly found that consummation of that merger would be consistent with the public interest without contemporaneous determination of the inclusion of E-L, D&H and B&M because the merger would help rather than hurt those carriers.

Cir. 1965), *cert. denied*, 384 U.S. 941 (1966). In that case, the Court of Appeals set aside an order of the Federal Power Commission which failed to determine protective conditions before the licensing of a power project. The Federal Power Commission had set for hearing the question of what protection was to be given, but it nevertheless allowed the project to begin before finding that any protective device could be adequate. The Court of Appeals held that the license had been granted without consideration of possible alternate plans and that the question of protection must be decided *before* deciding whether the project is to be licensed (354 F.2d at 624).

The *Scenic Hudson* case emphasizes the problem which is most serious here. The Commission has recognized the need for protection of other Eastern railroads against the effects of the Penn-Central merger, as, indeed, it was compelled to recognize the need for such protection by Section 5(2)(c) of the Interstate Commerce Act. Yet the Commission has permitted consummation of the merger without even finding that such protection is possible after the merger has been consummated. Until the Commission considers these issues, it has not completed its statutory duty to determine whether the Penn-Central merger is in the public interest.

It was simply irrelevant, in the light of this basic inadequacy in the Commission's action, for the court below to emphasize that none of the objecting carriers "question the ultimate desirability of the merger" (J.S., App. A, pp. 12, 37). Whatever the desirability of the improved service Penn-Central will offer, the Penn-Central merger cannot be found to be in the public interest unless and until the other railroads serving the East can be so restructured or otherwise protected that their ability to compete against the huge Penn-Central system is assured. The Commission's approval of consummation of the merger, without determining

this essential issue, constitutes a fundamental failure to meet explicit statutory responsibilities. Until the Commission completes its function by formulating essential conditions to the merger, consummation of Penn-Central cannot be considered in the public interest.

Interstate Commerce Commission action has previously been set aside because of a failure to resolve essential issues. In words particularly apt to the present case, Mr. Justice Cardozo condemned "piecemeal" administrative action of this kind in *United States* v. *Chicago, M. St. P. & P. R. Co.*, 294 U.S. 499, 510 (1935):

> "This was not a full discharge by the Commission of an immediate responsibility. It was inaction and postponement. Responsibility was shifted from the shoulders of the present to the shoulders of the days to come."

The Commission's order permitting immediate consummation of the Penn-Central merger should also be set aside for unlawfully shifting the determination of essential conditions "to the shoulders of the days to come."

II. INJUNCTIVE RELIEF IS NECESSARY TO PROTECT APPELLANTS FROM IRREPARABLE INJURY.

Before the district court, appellants showed that consummation of the Penn-Central merger prior to the determination of adequate and lawful protective conditions would cause irreparable injury in several separate respects. The district court rejected these claims, but, as will be shown below, it did so on the basis of unprecedented theories which are contrary to established law.

A. The Commission's Failure to Determine Essential Conditions Before Consummation of Penn-Central Threatens the Imposition of Additional Injuries Upon the Unprotected Carriers.

An immediate threat of injury to the unprotected carriers from the Commission's action in permitting consummation of Penn-Central arises from the effect of that action on the proceedings now in progress before the Commission to formulate protective conditions.

Suppose that, following a hearing, it should appear that it is not feasible simultaneously to protect the three protected carriers from the impact of Penn-Central by an arrangement which does not, at the same time, seriously injure the unprotected carriers and have serious anticompetitive effects. The Commission assumes that, somehow, in some way, it can reconcile all of the interests to be protected, and can afford adequate protection to the Erie-Lackawanna, Delaware and Hudson and Boston and Maine without jeopardizing the interests of the unprotected carriers but there is no support for any such assumption.

When the case originally was before the Commission, at least three alternatives were open to the Commission if it found that all of the conflicting interests at stake here could not be reconciled: it could have cut back on the protection accorded the protected carriers; it could have forced the unprotected carriers to absorb additional injury; or it could have delayed the consummation of Penn-Central. In its original report the Commission recognized these alternatives, and it ruled that it would not allow Penn-Central to consummate unless three railroads were protected (327 I.C.C. at 532). Once Penn-Central is consummated, however, the Commission's stated alternative would no longer be available. The Commission would be forced to choose between withdrawing protection from the protected car-

riers or inflicting injury upon the unprotected carriers, even though the evidence might dictate a contrary result.[18] Even if the evidence were clear that the best alternative from the standpoint of maintaining the entire Eastern railroad system would be to delay the merger, the Commission, having boxed itself in, could only choose between the other alternatives. Thus, consummation of the merger inevitably would threaten either the protected railroads or the unprotected railroads with undue injuries.

It is extremely likely that all the conflicting interests cannot be reconciled. Although the court below refused to "take seriously the dismal forecast that conceivably it might prove impossible" (J.S., App. A, p. 36),[19] the realities of the situation are that the Commission has issued two reports and has not yet formulated any conditions which reconcile the conflicting interests in a lawful manner.

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[18] The Commission has also foreclosed the possibility that at least some of the unprotected carriers could be treated as additional protected carriers subject to the same protective conditions.

At the hearing currently being conducted on the formulation of protective conditions, the Commission has refused even to receive evidence showing that Reading and CNJ would also suffer losses to such an extent that protective conditions are required to protect the public interest in adequate transportation service (I.C.C. Order in Finance Docket 21989 dated November 10, 1966). The Commission again relied upon a theory of laches (see J.S., App. B, p. 24). Such a theory has no place in the consideration of protection needed in the public interest. See *FTC* v. *Algoma Lumber Co.*, 291 U.S. 67, 80 (1934).

[19] The most the court below could say affirmatively, however, was that, when the Commission's hearings and further consideration have been completed, "we *may* find provisions carefully tailored to prevent or at least minimize the feared manipulation or, conceivably, financial provisions of an entirely different character . . ." (J.S., App. A, p. 26). (Emphasis added.)

The only form of protection yet suggested for the three protected carriers is the "indemnity" scheme prescribed in the April 6th report. Such an arrangement probably will be reinstated after the hearings are completed. The three protected carriers have embraced the concept of such a scheme and object to it only on the ground that the terms of the scheme should be sweetened for their benefit (J.S., App. B, pp. 37-38). The Commission also continues to embrace this scheme, for it has, over the objection of appellants, determined such a scheme to be lawful and has provided that when it is reinstated any indemnity payment will be retroactive to the date of consummation of the merger (J.S., App. B, pp. 38-39, 44).

The "indemnity" arrangement creates an irreconcilable conflict between the three protected carriers and appellant unprotected carriers. By the arithmetic of the formula, any traffic that Erie-Lackawanna, Delaware and Hudson or Boston and Maine divert from *any* system to Penn-Central will produce a benefit for those railroads. Similarly, any traffic that Penn-Central diverts to the protected carriers will produce a corresponding benefit to Penn-Central because of the change in the traffic ratio on which the "indemnity" payments are calculated. For the first time, incentives are created for Penn-Central and the three protected carriers to cooperate in diverting traffic from appellant unprotected carriers.

Any arrangement similar to the "indemnity" conditions of the Commisson's April 6th report would constitute a "combination" for the "pooling or division" of traffic or revenues in violation of Section 5(1) of the Interstate Commerce Act (49 U.S.C. § 5(1)). The Commission, in its September 16th report, although rescinding the "indemnity" conditions, held that they did not violate the Act (J.S.,

App. B, pp. 38-39).[20] Despite this reaffirmation by the Commission of its reliance upon a protective system similar to that of its original report and despite the substantial objections to it raised by appellants, the district court did not decide the question (J.S., App. A, pp. 26-27).

Only if the Commission finds that a revenue pool "will be in the interest of better service to the public or of economy in operation, and will not unduly restrain competition" can the Commission authorize such an arrangement (49 U.S.C. § 5(1)). The court below brushed the whole problem aside with the statement that, despite the Commission's ruling that Section 5(1) did not apply, "the Commission may decide to make findings" (J.S., App. A, p. 26). The anti-competitive effects which the Commission must consider

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[20] The Commission did not deny that its formula would have the adverse effect appellants claim. Instead, it held, alternatively, that Section 5(1) did not apply because the Commission devised the plan and that the Commission could enter an order under § 5(2)(b) of the Act without regard to the requirements of § 5(1) (J.S., App. B, pp. 38-39). Both rulings are clearly erroneous.

The indemnity plan, if not a "contract" between carriers, is plainly a "combination." Who proposes or creates the pool is irrelevant. Moreover, the first proviso to § 5(1), by requiring the subsequent assent of the carriers involved, clearly contemplates that Commission initiated proposals come within § 5(1). In any event, acceptance by the parties is not lacking. The Commission itself described the scheme as an "option" which Penn-Central could either accept or reject (J.S., App. B, pp. 14, 41), and the acceptance of the protected carriers is also voluntary.

The Commission's alternative conclusion, that § 5(2) is a source of power overriding all other provisions of Section 5, is equally erroneous. *Chicago & N.W. Ry.* v. *Peoria & P.U. Ry. Co.*, 201 F. Supp. 241, 254 (S.D. Ill., 1962), *affirmed*, 319 F.2d 117, 122 (7th Cir. 1963), *cert. denied*, 375 U.S. 969 (1964).

in approving pooling arrangements are precisely the adverse effects that appellants claim the "indemnity" scheme will inflict upon them to the detriment of the public interest. How can the court assume now, before any hearing, that the evidence will support the statutory findings?

In addition to the problems posed by the temporary conditions including an "indemnity" arrangement, the impact of Penn-Central upon the protected railroads may be so serious that one or more of them should be awarded a capital indemnity (J.S., App. B, p. 42). But the Commission has nevertheless allowed the consummation of Penn-Central before such an indemnity is determined and has preserved to Penn-Central its full rights to judicial review on that issue (J.S., App. B, p. 43). This creates an intolerable situation. Even if the Commission should determine that a capital indemnity is essential to maintain the service of the three protected carriers in the face of Penn-Central competition, Penn-Central will be free to seek the removal of this condition. Indeed, counsel for Penn-Central have taken the position "that the Commission is without power to impose such condition" (I.C.C. Finance Docket No. 21989, October 31, 1966, Tr. 20,063, 20,064). If Penn-Central should succeed in setting aside any capital indemnity the Commission imposes, the results would be disastrous.

By definition, a capital indemnity is a death benefit paid to compensate for permanent loss of business. Once such permanent loss occurs, there will be no way to restore the status quo. Although the Commission has recognized that the ultimate solution to the problems caused by Penn-Central lies in at least some realignment of the remaining Eastern railroads, the Commission has authorized consumma-

tion of the Penn-Central merger before even resolving the capital indemnity question which may be essential to any realignment involving the protected carriers.[21] Once Penn-Central has been consummated, the three protected carriers may well be injured to the extent that their inclusion in any other system will be impossible.[22]

If the Commission had resolved the problem of protection for other Eastern railroads before allowing consummation of Penn-Central, none of these problems would be presented. All of the alternatives would have been preserved. The one selected could have been tested through the usual method of agency hearings and judicial review without any fear that, should these tests determine the inadequacy of that alternative, irreparable injury would result. By allowing consummation of Penn-Central and establishing this truncated procedure for resolving essential issues relating to that transaction, the Commission has foreclosed the consideration of alternatives that bear importantly on the

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[21] The determination of capital indemnities may bear upon the financial terms on which the permanently injured railroads can be included in any other system. Until the issues of whether there is to be a capital indemnity, and its amount, are finally decided, any restructuring of the Eastern railroads which includes the protected carriers is left in doubt.

[22] The Commission has stated that it will not defer consummation of the Penn-Central merger until other Eastern rail consolidation proceedings have been completed (J.S., App. B, p. 13). This statement, however, is not responsive to the immediate issue. What is required in order to safeguard the public interest is that this alternative be preserved until a determination has been made that adequate interim protection is feasible. Until such protection has been fashioned, especially in light of the serious doubts on this record as to the possibility of this result, it is premature to foreclose alternatives which may well be the only ones which offer a solution to the problems created by Penn-Central.

public interest. See *Ashbacker Radio Corp.* v. *FCC*, 326 U.S. 327 (1945). Alternatives, which may after a hearing and judicial review in fact provide the only solution consistent with the public interest, would have "as a practical matter been substantially nullified" if Penn-Central is allowed to consummate prematurely (326 U.S. at 334).

B. The District Court Erred in Holding That the Immediate Consummation of Penn-Central Would Not Deprive Appellants of Effective Judicial Review.

If Penn-Central is permitted to consummate its merger now, before the Commission has determined what protective conditions will be prescribed, appellants will be irreparably injured by being deprived of effective judicial review of those conditions. As has been shown, there are serious conflicts between the protected and unprotected carriers caused by the Commission's indemnity scheme, and there is every likelihood that the Commission will resort to an illegal revenue pool as the means for protection. If appellants should succeed in any subsequent review of these conditions in demonstrating their illegality, the reviewing court would be powerless to prevent injury. By setting aside the conditions, the reviewing court would only increase the injury to other railroads, because the result would be a consummated Penn-Central with inadequate protection for the remaining railroads. Under such circumstances, as in *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4, 10 (1942), "judicial review would be an idle ceremony" because the situation would be "irreparably changed" before the Commission's action could be corrected.

Here, as in most merger cases, review must be obtained before consummation of the merger or no effective review

at all will be available.[28] The Court recognized this fact in its recent decision in *FTC* v. *Dean Foods Co.*, 384 U.S. 597 (1966), which upheld the power of the Federal Trade Commission to seek and the power of the courts to grant preliminary injunctions against mergers challenged by that Commission under Section 7 of the Clayton Act. The Court specifically acknowledged the difficulty in unscrambling merged assets and the impossibility of restoring affected parties to their previous position (384 U.S. at 607 note 5). In *Florida East Coast Ry.* v. *United States*, 228 F. Supp. 340, 343 (M.D. Fla. 1964), Judge Simpson, in staying the consummation of another railroad merger pending review, properly ruled:

> "The result [of not enjoining the order] would be to permit the merger to proceed as ordered while its legality is litigated. If these plaintiffs ultimately prevail, the resulting chaos could never be restored to order, the injury to plaintiff and intervening plaintiffs could never be repaired. Such a result is difficult for me to reconcile with a statutory scheme which, as indicated above, would appear to envision that interested parties be entitled to seek orderly and *effective* judicial review of administrative orders." (Emphasis in original.)

The enormous magnitude of the merger at issue here makes this principle especially applicable. Once Penn-Central has merged, the reluctance to set aside so large an undertaking must necessarily bear unfairly upon appell-

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[28] The courts have regularly issued such stays in railroad merger cases. *Minneapolis & St. L. Ry.* v. *United States*, 165 F. Supp. 893, 901 (D. Minn. 1958), *aff'd*, 361 U.S. 173 (1959); *Canadian Pac. Ry.* v. *United States*, 158 F. Supp. 248, 251 (D. Minn. 1958); *City of Nashville* v. *United States*, 155 F. Supp. 98, 100 (M.D. Tenn. 1957), *aff'd*, 355 U.S. 63 (1957); *Florida East Coast Ry.* v. *United States*, 228 F. Supp. 340, 343 (M.D. Fla. 1964).

ants. This seriously affects any subsequent judicial review, as the district court recognized in stating that appellants "feared with reason that even if a dissolution [of Penn-Central] were in the realm of reality . . . its adverse effects would impair true freedom of decision" (J.S., App. A, p. 35).

The district court did not deny that judical review normally would be ineffective if the Commission's protective conditions should prove to be inadequate or illegal. In an effort to meet this problem, the district court itself undertook to guarantee that adequate protection would be afforded. By claiming the power to require the Commission to adopt particular conditions, the court below said that the consummation of Penn-Central would have no bearing upon its decision or upon the possibility that the Commission would be unable to protect the other Eastern railroads. The theory of the court below was that it could, "if it should deem these contentions to be well founded . . . *require appropriate change*" (J.S., App. A, pp. 35-36) (Emphasis added). And the court further held that, at least where "such narrow issues as will here be presented," a reviewing court "could inform the Commission in a way it would thoroughly understand" just what condition the reviewing court thought ought to be imposed (*id.* at p. 36).

This theory that a reviewing court has power to require an administrative agency to prescribe a particular condition to a merger is erroneous. In *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952), this Court made it plain that once a reviewing court "lay bare" an error of law, its function was completed. See also *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4, 10 (1942). The court can no more direct an administrative agency to prescribe a particular condition to a merger than it can direct the agency to approve the merger itself. Nor may a court properly attempt to

"inform" an administrative agency as to how it should perform its function. Because agencies exercise powers delegated by Congress, the scope of judicial review of agency action is necessarily limited. When a court makes decisions that have been entrusted to the agency, it usurps powers which Congress has declared shall be exercised only by the agency and it assumes an expertise which the administrative agency alone possesses. If courts, under the guise of judicial review and through the threat implicit in suggestions, are to be permitted to make decisions which are essentially administrative and within the discretion of the Commission, the limitations upon judicial review become meaningless.

Thus, the decision below is based upon an unlawful premise. By allowing Penn-Central to consummate before essential conditions have been fashioned, appellants have been unlawfully deprived of their statutory right of judicial review. This represents a marked departure from the prior administration of the Interstate Commerce Act. No case has been cited in which a railroad merger was consummated prior to determination of a pending action for judicial review. This is a practical recognition of the principle that it is useless to lock the barn after the horse has gone. This is the principle that should be applied here.

C. The District Court Erred in Dismissing Appellant Carriers' Claim of Injury From the Commission's Indemnity Scheme on a Theory of "Unwarranted Legal Injury."

When the Commission prescribed the special "indemnity" conditions for Erie-Lackawanna, Delaware and Hudson and Boston and Maine in its April 6th report, the unprotected carriers objected on the grounds that those conditions would result in massive traffic diversions from their systems. In its September 16th report, the Commission rec-

ognized the need for a hearing on the effects of the "indemnity" formula upon the other Eastern railroads. Although the Commission purported to rescind its protective scheme, the Commission at the same time made it plain that this rescission is to be only temporary with payments to be retroactive to the date of consummation, thus assuring the continuance of the adverse effects from that scheme upon the unprotected carriers.

The district court acknowledged the claim of the unprotected carriers that "the very potentiality of retroactive indemnity provisions" threatened their revenues immediately upon consummation of the Penn-Central merger (J.S., App. A, p. 27). The claim was rejected on the theory that the "threat of unwarranted legal injury" was insufficient to justify interlocutory relief in light of counteracting factors, including specifically opposing affidavits submitted by Central and the Commission's finding that the task of implementing the Penn-Central merger is "so vast and complex that its competitive effects will be felt only gradually" (*id.* at p. 30).

In the first place, the only opposing affidavit (of Central affiant Patten) was not addressed to the features of the "indemnity" formula that would cause the diversions of traffic away from the unprotected carriers. And the time it will take to implement the Penn-Central merger has no bearing upon the traffic diversions that will be caused by an "indemnity" formula as to which payments are effective as of the date of consummation, as opposed to full implementation, of the merger.[24]

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[24] The holding of the court below that: "It was undisputed that, even without the special traffic conditions, some time must pass before the merger would have serious adverse effects on anyone" (J.S., App. A, p. 30), does not relate to the effect of the "indemnity" arrangement on the unprotected carriers.

Fundamentally, the district court has rejected appellants' claim of injury on a novel concept of "unwarranted legal injury." This concept presumes that actual injury will result, but that it may be determined that such injury is "warranted". By "unwarranted legal injury," the court below apparently meant injury in such degree as to impair the "viability" of a carrier (J.S., App. A, pp. 27-28). But, before determining that injury to all or any of appellant unprotected carriers could be "warranted," at the very least a determination must be made of the effect of such injuries upon appellants' abilities to provide service to the public. Such a determination is a task entrusted exclusively to the Commission which has, as yet, made no determination of the effects of an "indemnity" formula on any of the unprotected carriers. Indeed, no hearing on the effects of an "indemnity" formula has as yet been held.

Nor was there any basis for any assumption on the part of the district court that the Commission could, at its hearing yet to be held, find that no "unwarranted legal injury" would be shown. Each of the unprotected carriers presented affidavits showing the large volumes of its freight revenues subject to diversion by the protected carriers and Penn-Central as a result of an "indemnity" arrangement. These losses of revenues would affect the ability of each appellant to serve the public. The most immediately affected would be appellant Central Railroad of New Jersey which is now experiencing deficits at the annual rate of $7 million and is on the verge of bankruptcy even before consummation of Penn-Central and the impact of an "indemnity" arrangement.[25] Any injury to CNJ would immediately affect the ability of that carrier to provide essential transportation services.

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[25] Affidavit of James L. Barngrove, Jr., dated September 12, 1966, showing that CNJ would be subject to loss of $4.9 million of freight revenues annually upon consummation of Penn-Central.

Under such circumstances, the district court erred in refusing to protect the unprotected carriers from irreparable injury on the erroneous theory that such injury might, on a record yet to be made, be found to be "warranted legal injury."

III. THE DISTRICT COURT ERRED IN UPHOLDING COMMISSION ACTION ON BASES NOT RELIED UPON BY THE COMMISSION ITSELF.

A fundamental principle of administrative law is that agency action may be upheld, if at all, only on the grounds stated by the agency itself and not upon alternative theories advanced by a court on judicial review. Both aspects of this principle were violated by the court below. Although it held that there was no support for the decisive ground stated by the Commission, the district court nevertheless permitted the Commission's order to go into effect, upholding the Commission's action on grounds not relied upon at all by the Commission.

A. Having Unanimously Rejected the Decisive Reason Stated by the Commission in Support of Immediate Consummation, The District Court Erred in Not Granting Injunctive Relief.

The critical issue before the Commission in its September 16th report was whether to defer consummation of Penn-Central for a matter of months until protective conditions for other railroads had been considered following a hearing. The decisive reason stated by the Commission for permitting Penn-Central to consummate, although material conditions to that merger had not been formulated, was the urgency of making available a solution for the New Haven.

In its April 6th report, the Commission found that the Penn-Central merger, "without complete inclusion of NH, would not be consistent with the public interest" (327 I.C.C. at 524) and approval of the merger was conditioned upon inclusion of New Haven (327 I.C.C. at 527). In making these findings, the Commission acknowledged that the Penn-Central merger, "with new routings and improved service, could undoubtedly wean substantial traffic away from NH and leave that already moribund carrier in perhaps an irretrievable situation" (327 I.C.C. at 522).

When the Commission linked its approval of Penn-Central to the continued operation of the New Haven properties as a part of the merged system, a common misapprehension arose that immediate consummation of Penn-Central was essential to save the New Haven.[26] In its September 16th report, the Commission relied specifically upon the New Haven situation as the reason for permitting immediate consummation of Penn-Central. In considering the "Time of Consummation" of the merger

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[26] The files of the Commission contain numerous communications from public officials in New Haven territory urging immediate consummation of Penn-Central. For example, on July 20, 1966, eight United States Senators from the States served by New Haven sent a letter to the Commission stating as follows (Letter of July 20, 1966, on file in I.C.C. Finance Docket 21989):

> "The New Haven Railroad is vital to the economy of the Northeast and can survive only by becoming a part of the merged Pennsylvania-New York Central system. It is urgent, therefore, that the Penn Central merger be consummated as quickly as possible in order to assure continued operation of the New Haven.
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> • • •
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> "The Interstate Commerce Commission should not allow delaying tactics to be invoked in the face of the great crisis which faces the New Haven."

(J.S., App. B, pp. 13-16), the Commission first rejected requests for postponement until E-L, D&H and B&M were included in a major rail system on the ground that the benefits of a Penn-Central merger should not be deferred for such a purpose, "perhaps for several years" (*id.* at p. 15). But when the Commission turned to the quite different question of whether a brief postponement, during the period of the hearings on interim protection of other Eastern railroads, would be in the public interest, the Commission answered that critical question (which is the only question now before the Court), by relying upon the plight of the New Haven (J.S., App. B, pp. 15-16):

> "Absent the applicants' merger we see no solution to the New Haven problem. Certainly, neither of the applicants separately can be required to take over New Haven's deficit-ridden operations. We are not prepared to take this risk involved in a substantial postponement of consummation of the merger. Moreover, *we are not prepared to take the risks which delay of consummation of even six or twelve months might entail in providing a solution of the New Haven problem other than liquidation.*" (Emphasis added.)

This is the specific reason given by the Commission for its belief "that the public interest requires prompt consummation of the proposed merger" (J.S., App. B, p. 16).

The Commission's finding is arbitrary and unsupported by evidence because the New Haven is not ready for inclusion in a Penn-Central system. Although the Commission explicitly conditioned its approval of Penn-Central upon the inclusion of the New Haven (327 I.C.C. at 524, 527), the terms and conditions of inclusion are to be determined in a separate proceeding (327 I.C.C. at 527). Arriving at the terms for inclusion also requires proceedings before the United States District Court which has jurisdiction over New Haven under the Bankruptcy Act (327 I.C.C.

at 525, 527). In its original report the Commission stated (327 I.C.C. at 524-25):

> "[T]he public interest requires a complete restructuring of all New Haven operations. Inclusion of the New Haven's services and the restructuring effort which we call for here and in our ultimate conclusions in the [passenger service] discontinuance case will not be easy. It will demand coordination, cooperation and statesmanship on the part of many interests involved as well as the railroads. And we do not in any sense overlook the fact that since New Haven is in bankruptcy, its inclusion will entail reorganization problems under section 77 of the Bankruptcy act which must be resolved in conjunction with any inclusion proceeding herein."

Moreover, Reading, Western Maryland, and CNJ will also be affected by any inclusion of New Haven in Penn-Central. In addition to accomplishing the difficult restructuring of New Haven, protection must be afforded these and other adversely affected carriers (327 I.C.C. at 527).

In the proceedings before the district court, it was acknowledged that a delay in consummation of Penn-Central would not delay the solution for the New Haven. Counsel for the New Haven Trustees conceded as much. He stated that the inclusion of the New Haven in Penn-Central "is going to take a long time" even if Penn-Central were already consummated (Tr. 147).[27] Counsel for the New Haven Trustees also saw no problems in running "concurrent inclusion proceedings" while the Commission is conducting proceedings respecting the protection of other Eastern

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[27] More recently, the Vice President-Marketing of New York Central has testified before the Commission in the Penn-Central case that Central is "in no position to forecast when the New Haven, or when the Susquehanna, *if ever*, will become a part of the Penn-Central system" (I.C.C. Finance Docket No. 21989, November 4, 1966, Tr. 20,686) (Emphasis added).

railroads (Tr. 147). Counsel for the Commission admitted that a short postponement of consummation would not create any risk to New Haven (Tr. 113).

On this record, the district court unanimously rejected the Commission's position that immediate consummation of the Penn-Central merger was necessary in order to save the New Haven stating: "It is unrealistic to suppose that inclusion of NH in the Transportation Company can be accomplished before conclusion of the Commission's reconsideration in this case . . ." (J.S., App. A, p. 21; see also pp 62-63). The court also properly rejected the apprehensions of counsel for the Trustees that delay in consummation would curb public support of the New Haven (J.S., App. A, pp. 21-22), finding that the New Haven had "sufficient measure of the assurance required" to obtain such support (*ibid.*).

Although the district court rejected the crucial reason given by the Commission for allowing Penn-Central to consummate immediately, it did not set aside the Commission's order. Rather, it determined on grounds of its own that consummation should nevertheless be allowed. This was error. A reviewing court must act on the basis of the findings of the agency and may not supply alternative grounds for decision. *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168-169 (1962); *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947). As was explained in *Burlington Truck Lines* (371 U.S. at 169):

> "For the courts to substitute their or counsel's discretion for that of the Commission is incompatible with the orderly functioning of the process of judicial review. This is not to deprecate, but to vindicate . . : the administrative process, for the purpose of the rule is to avoid 'propel[ling] the court into the domain which Congress has set aside exclusively for the administrative agency.'"

Administrative action must "be upheld, if at all, on the same basis articulated in the order by the agency itself" (*ibid.*). Accordingly, the district court erred in failing to set aside the Commission's order when it had determined that there was no support for the Commission's decisive conclusion that the New Haven situation required immediate consummation of the Penn-Central merger.

B. The District Court Relied Upon Matters Which Were Not and Could Not Be Relied Upon By the Commission.

The Commission and the parties agree that the only permanent solution to the problem posed by the three "protected carriers" is their inclusion "in a major system" able to compete with Penn-Central. In its April 6th report, the Commission found it "doubtful that, without inclusion in a major system, these three carriers could withstand the competition of [Penn-Central]" (327 I.C.C. at 532).

The whole purpose of providing special protective conditions was to preserve these three carriers "during the period necessary to determine their future" (327 I.C.C. at 532). The Commission did not assume that the proceedings to "determine their future" would be simple or brief: On the contrary, the Commission's September 16th report faced the prospect that it would require "several years" (J.S., App. B, p. 15).

The district court decided the case below on quite a different premise. At the outset of its opinion, in a remarkable footnote (J.S., App. A, p. 10, note 4), the court below referred to pending petitions of E-L, D&H and B&M for inclusion in the present N&W system and stated:

> "The Commission evidently thought the protective period would not be of long duration, and the lapse of time since April, 1966, has made this shorter still. Although the Commission's duty to avoid prejudgment prevented its saying so, no great clairvoyance is needed

> to predict the likelihood of its finding that the public interest is consistent with inclusion of the three roads on proper conditions in the N&W system . . ."

The majority opinion also suggested that, although it made no finding to that effect, the Commission could well have felt that immediate consummation of Penn-Central "would act as a spur to bring these roads and N&W together on a basis fair to all" (*ibid.*).

All of this is pure conjecture without the benefit of any exposure to the record as made in the pending N&W inclusion case before the Commission, and without any support in the Commission's findings in the present case.

The majority opinion below simply assumes that, given the desire to do so, the protected roads and N&W can work out inclusion of those three carriers in the present N&W system. The issues in that proceeding, however, are whether inclusion of those carriers in the existing N&W system is in the public interest, and, if so, what would be equitable terms to all parties (324 I.C.C. at 148); and the record in that case shows that there are insurmountable obstacles to inclusion with respect to both issues.

Erie-Lackawanna is the only one of the protected railroads that connects with N&W. The management of that railroad, representing its stockholders, insists that N&W pay a substantial price for the Erie-Lackawanna stock. But the record in the pending inclusion proceeding shows that the Erie-Lackawanna stock has no real value and is substantially under water.[28] The Erie-Lackawanna proper-

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[28] Erie-Lackawanna has $340 million of debt, it has accumulated net income deficits of $76 million since 1957 and in no recent year, even the boom year of 1965, have Erie-Lackawanna earnings risen to the level of its fixed charges and full contingent interest.

ties are in deplorable condition and much of its equipment is obsolete. Some $150 million will have to be expended to rehabilitate Erie-Lackawanna's road, structures and equipment. The deficit-ridden Boston and Maine is in even worse condition than Erie-Lackawanna and is facing a $46.5 million bond maturity in August, 1967.

Any inclusion of these railroads in the present N&W system would not be in the public interest because of the inability of that system alone to carry the burden of rehabilitation and to compete with a Penn-Central system having twice the size and far broader territorial coverage. Moreover, a system which included N&W and the three protected carriers would divert traffic from, and inflict additional injury upon, other Eastern railroads, particularly Reading and Central Railroad of New Jersey. The net effect would be to bankrupt the CNJ in order to save the three protected railroads from Penn-Central, which in turn is justified by the need for saving the New Haven. Such a result could hardly be found consistent with the public interest.

Without even having the record in the pending inclusion proceeding before it, the court below was seriously in error in presuming that it would be in the public interest to include the three protected railroads in the present N&W system and that equitable terms could be determined if only the parties had the desire to do so. The lower court was especially in error in assuming that consummation of Penn-Central will stimulate a solution of the problem. Viewed realistically, the losses that Penn-Central will inflict on the already inadequate revenues of the three protected carriers will not only aggravate the problem of

determining their terms, but will threaten the ability of these railroads to provide services, either as independent railroads or as subsidiaries of N&W. By assuming away the difficulties attendant upon inclusion of the protected carriers in the existing N&W system, the district court only compounded the problem.

The misconceptions of the court below with respect to the other Commission proceedings affecting Eastern railroad mergers pervade its decision. This is further revealed in the extraordinary reference in the majority opinion to "the jockeying of these roads and of the three plaintiffs in the C&O, B&O and N&W actions for price and position in respect of other mergers—which, despite all the words, is what we suspect these actions to be mostly about" (J.S., App. A, p. 39). Any "jockeying" is the inevitable result of the impact of the giant Penn-Central system on the nine railroads now handling the other half of the Eastern railroad business. The actions of all of the appellant carriers, protected as well as unprotected, arise from their common need to preserve their competitive capabilities in the face of a Penn-Central system that will start with half the railroad business in the East and will be able to attract additional business by offering single-line rail service throughout the East that cannot be matched by any other existing Eastern railroad system.

In order to create a balanced competitor capable of providing comparable benefits of single-line service throughout the East, N&W and C&O have agreed to merge and to include in the resulting system all of the railroads making up the half of the East not embraced in the proposed Penn-Central system. The N&W-C&O merger appli-

cation was filed with the Commission on October 11, 1965 (see 327 I.C.C. at 487), but hearings have not even begun.[39]

Whether or not the Commission can lawfully permit consummation of the Penn-Central merger before a restructuring of the other half of the East can be accomplished, it is manifest that N&W and C&O have a genuine interest in securing protection against the harm which Penn-Central would inflict upon carriers that would also be part of a second system having size and coverage comparable to that of Penn-Central. In dismissing this interest as mere "jockeying . . . for price and position," the court below finds no support in any finding of the Commission. On the contrary, the Commission referred to E-L, D&H and B&M as "prospective affiliates" of both N&W and C&O (327 I.C.C. at 554) and permitted N&W to intervene in the Penn-Central proceeding because of the alternative proposals for inclusion of the three protected carriers in the present N&W system or in the proposed N&W-C&O system (J.S., App. B, pp. 42-43).

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[39] A prehearing conference was held on September 8, 1966, at which N&W and C&O requested a prompt hearing. The only railroads expressing unqualified opposition were Penn and Central. The Commission refused (by a 6-5 vote) to set the N&W-C&O merger for hearing, finding, *inter alia* (Order dated October 4, 1966, in I.C.C. Finance Docket 23832 et al.):

> *"We further find,* That the commencement of oral hearings in Finance Docket No. 23832 [N&W-C&O merger case] would tend to interpose new and complex factual, legal, and procedural issues into the existing situation of railroad unification in the eastern district and unduly delay the disposition thereof in Finance Docket No. 21510 [N&W inclusion case] and Finance Docket No. 21989 [Penn-Central merger case]; . . ."

If, as the Commission found, any factual issues presented in the N&W-C&O merger proceeding would cast new light on the Penn-Central merger, this is a reason for expediting hearings to develop such facts, not a reason for refusing to set even an initial hearing over a year after the N&W-C&O merger application was filed.

Petitions for reconsideration of the Commission's order refusing to set hearings on the N&W-C&O merger application are now pending before the Commission.

Accordingly, there is no basis in the Commission's findings for either of the foregoing erroneous premises relied upon by the lower court—the premise that the protected carriers can readily be included in the present N&W system and the premise that appellants are merely "jockeying . . . for price and position." This action of the court below constitutes a further violation of the rule in the *Chenery* case which requires that administrative action "be upheld, if at all, on the same basis articulated in the order by the agency itself" and not upon the basis of theories and assumptions substituted by the court (pp. 43-44, *supra*).

IV. THE DISTRICT COURT ERRED IN FAILING TO ENFORCE THE FINDINGS REQUIREMENTS OF THE ADMINISTRATIVE PROCEDURE ACT.

A legal error pervading the action of the Commission was its failure to make reasoned findings on material issues as required by Section 8(b) of the Administrative Procedure Act. Section 8(b) provides that agency decisions "shall . . . include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record . . ." (5 U.S.C. § 1007(b)).

One area as to which the Commission has made no findings at all, in either its April 6th or its September 16th report, is the effect on competition of the prescribed protective conditions. The Commission's April 6th report discussed at length the competitive effects and offsetting considerations with respect to the merger of Penn and Central (327 I.C.C. at 503-517), but nowhere did it consider the effect on competition of either the traffic conditions or the "indemnity" formula which it prescribed. And, in the September 16th report permitting immediate consummation of the merger, the Commission made no findings as to the anti-

competitive effect of either the traffic conditions which would go into effect upon consummation or the "indemnity" condition as to which payments retroactive to date of consummation are authorized.

As construed by Penn and Central, the traffic conditions will eliminate rail competition in the areas served by Penn-Central and the three protected carriers.[30] This would eliminate all rail competition in most of New England and New York State (as shown in the Map Appendices to this Brief). Whether or not such a result is permissible under the Interstate Commerce Act upon proper weighing of the facts by the Commission, the pertinent point here is that the Commission has made no findings whatever with respect to the impact on competition of the conditions which it has prescribed.[31]

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[30] This construction was stated at the hearings below by counsel for Penn-Central (Tr. 132):

> "JUDGE FRIENDLY: Do you construe the traffic conditions as preventing the merged company from using this solicitation force to get traffic routed over its lines rather than routing it over one of these three even if it doesn't do any of the things specifically named there?
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> "MR. GRAY: If it is traffic that they are handling and have been handling, yes. We cannot do any act, take any action which would do it, and certainly that is an action."

The qualification that the prohibition against solicitation concerns traffic which the three "protected carriers" are now handling does not remove the anti-competitive effect. See *Sunshine Biscuits, Inc.* v. *FTC*, 306 F.2d 48, 52 (7th Cir. 1962).

[31] The actual impact of the traffic conditions upon competition, as well as their effectiveness in protecting E-L, D&H and B&M, is ambiguous. Even before consummation, a controversy has arisen before the Commission as to whether a tariff filed by Penn violates the spirit and language of the Appendix G traffic conditions. A protest filed by E-L contends that the traffic conditions preclude filing of reduced rates over existing Penn routes, whereas a reply filed by Penn asserts that, under Appendix G, Penn-Central would

A corresponding effect of this restriction upon competition as between the protected carriers and Penn-Central is that the full force of the increased competitive strength of Penn-Central will be channeled against the unprotected carriers. This adverse effect of the traffic conditions, although squarely raised before the Commission and before the court below,[32] has never been justified by any finding.

A separate area in which the Commission has failed to make necessary findings concerns the basic question of whether adequate protective conditions can be fashioned which will enable the other Eastern railroads to survive in the face of Penn-Central competition. This subject has been previously discussed in its bearing upon the Commission's duties under Section 5(2) of the Interstate Commerce Act to complete the essential elements of a merger transaction before it permits consummation (pp. 21-26, *supra*).

Clearly, the indemnity conditions prescribed in the April 6th report were crucial to the Commission's approval of the consummation of Penn-Central. Nevertheless, the Commission's original report contained no findings with respect to the impact of this arrangement upon appellant railroads. Although these conditions entailed far-reaching consequences for appellant railroads by establishing financial

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still be permitted to file any rate over any existing route, "which it very well could have done alone without any reference to the effectiveness of the merger . . ." (Reply dated October 28, 1966, in I.C.C. Suspension Board Case No. 43830, pp. 18-19). Until such basic controversies as to the meaning of the traffic conditions are resolved, no one can tell to what extent the conditions will adversely affect competition or, indeed, to what extent those conditions will protect E-L, D&H and B&M.

[32] Complaint of Reading and CNJ dated September 12, 1966, Para. XVII. The majority opinion below thus erred in stating that these carriers "do not and could not claim that the traffic, as distinguished from the financial, conditions will hurt them" (J.S., App. A., p. 22).

incentives for the "protected carriers" to join with Penn-Central in diverting traffic from appellants, the Commission made no findings as to their effect upon appellants, whether such injury would be in the public interest, or whether other means of protection would be possible. This was error. *Gilbertville Trucking Co.* v. *United States,* 371 U.S. 115 (1962).

The Commission's supplemental report of September 16th, by rescinding the special indemnity conditions, aggravated this error. Although the Commission left undisturbed, and indeed reaffirmed, its earlier findings that the services of E-L, D&H and B&M were essential in the public interest and that protection for these carriers was necessary, it made no findings as to how it expected to fashion protection without adversely affecting other railroads and the public interest in balanced railroad competition. The Commission did not even find that such protection was feasible. Instead, the Commission acknowledged the absence of findings on these issues by postponing their consideration.

Even on the assumption that the Commission has power under Section 5(2) of the Interstate Commerce Act to permit the consummation of a merger prior to the determination of essential terms and conditions, the failure of the Commission to make findings justifying and explaining the exercise of that power in this case violates Section 8(b) of the Administrative Procedure Act. At the very least, if the Commission defers decision of essential issues, it must face the implications of its action. It must make findings as to the feasibility of resolving these issues in a manner consistent with the public interest, and it should determine, if any question as to feasibility exists, what effects the risk of failing to provide protection would have upon its initial determination. This Court has ruled that the Commission must make findings with respect to the available alterna-

tives. *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168 (1962). Findings must be made which are "specifically directed to the choice" between different remedies and which reveal a "rational connection between the facts found and the choice made" (*ibid.*). Only by following such a course, can the public be assured that the Commission has scrutinized proposals in accordance with the standards prescribed by Congress.

Adherence to the statutory requirements that reasoned findings be made is especially important where, as here, the Commission has admittedly changed its mind on the need for specific protective conditions as a prerequisite to consummation of the merger. In its April 6th report, the Commission held that, "unless they [the protected carriers] are protected during the period necessary to determine their future, we would not authorize consummation at this time" (327 I.C.C. at 532). The Commission thereupon prescribed a series of conditions and stated that "approval of the merger for undelayed consummation shall be subject, therefore, to the conditions specifically described in Appendix G" (*ibid.*). In its September 16th report, however, the Commission permitted immediate consummation without specifying the protective conditions.

Although an administrative agency is not bound by its previous decisions, it must provide a rational explanation for such a change of mind. *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 652-653 (1954). Until the Commission provides such an explanation, it is impossible to know whether the Commission has "disregarded its own findings" or whether it has modified its previously stated position respecting the need for interim protection (347 U.S. at 653-54). The subject of protection for other Eastern carriers, according to the Commission's own appraisal, is importantly related to the public interest in adequate

transportation service. By refusing to provide a complete explanation why the full protection previously thought necessary is no longer thought to be necessary, the Commission has left the parties and the reviewing court to speculate as to the basis for its action.

The district court did not hold that the Commission had provided reasoned findings on all material issues as required by Section 8(b) of the Administrative Procedure Act. Instead, the court below upheld the Commission on the theory that the Commission could "change its mind" without explanation except as to certain "vital findings" (J.S., App. A, p. 24). With respect to what it regarded as "vital findings," the court below would require "complete explanation" of a change in position, but as to other questions no explanation at all would be necessary (J.S., App. A, p. 25).[23]

The district court's distinction is an anachronism. Prior to 1946, Section 14(1) of the Interstate Commerce Act was the only applicable statute and it provided merely that the

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[23] The district court also suggested that the Commission's change of position with respect to the "indemnity" conditions made no difference; the "protected carriers had to make a showing that would have led [the court] to enjoin consummation of the merger if the Commission had been satisfied with the special traffic conditions . . ." (J.S., App. A, p. 28). This approach violates the findings requirements of Section 8(b). The Commission initially regarded the "indemnity" plan as essential to protect E-L, D&H and B&M. The Commission has not provided any reasoned explanation for withdrawing the protection it previously thought essential, nor has it made findings that the traffic conditions alone are sufficient. The district court cannot determine on its own that the "indemnity" conditions were surplusage. Moreover, the Commission's holding that "indemnity" payments would be retroactive to date of consummation (J.S., App. B, p. 44) shows that the Commission, unlike the district court, regarded protection from the date of consummation as essential for the protected carriers.

Commission shall "make a report in writing . . . which shall state the conclusions of the Commission" (49 U.S.C. § 14(1)). Under this provision, the Commission was not required to make "complete statements . . . showing the grounds upon which its determinations rest . . ." *Beaumont, S.L. & W. Ry. Co.* v. *United States*, 282 U.S. 74, 86 (1930). In that era, it was considered appropriate for the reviewing court to require the Commission to explain its actions only with respect to "essential" or "vital" issues.

Congress specifically addressed itself to this problem when it enacted Section 8(b) of the Administrative Procedure Act. That section provides that "all decisions . . . shall . . . include a statement of (1) findings or conclusions, *as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record.*" (Emphasis added.)

The purpose and effect of this provision is clear. Congress was not satisfied to permit administrative agencies to act upon reports which contained findings only with respect to "ultimate" or "vital" issues. In any proceeding in which other issues were presented, findings were to be made on those issues as well, so long as they were "material," and administrative agencies were to include a statement of the reasons underlying all such findings. The full breadth of Section 8(b) was described by Congressman Walter, one of the sponsors of the bill, on the floor of the House (92 Cong. Rec. 5653 (1946)):

> "The purpose and effect of these provisions are clear upon the face of the section. One matter should be emphasized. Section 8(b) requires findings and conclusions to be stated upon all the material issues of fact which the parties may present. This means that, within the legal framework of the type of case involved, the number and the subjects of the findings and conclusions will be determined by the record and by the

> legal, factual, or discretion issues raised by the parties. The mere parroting of findings or conclusions in the words of statutes, however sufficient that may be as an ultimate conclusion, definitely would not satisfy in any manner the requirements of this section unless both the statute and the issue were very narrow indeed. Almost any case of consequence involves numerous and detailed issues of law, fact, and discretion. These must all be determined as a part of the decision. Only in that manner are the parties protected and assured that the case has been fully and completely considered and determined."

The district court did not require Commission compliance with the standards of Section 8(b) in this case when it characterized the protective conditions of the Commission's original order as not "vital," thereby excusing the absence of reasoned findings supporting the Commission's change of mind. As has been shown, the plain language as well as the legislative purpose of Section 8(b) repudiates the district court's distinction. The test is not whether certain findings are "vital," a vague and elusive standard at best, but whether the issues before the Commission are "material." There is no doubt as to the materiality of the question of the protective conditions to be imposed, for they were found by the Commission itself in its April 6th report to be a prerequisite to immediate consummation of the Penn-Central merger. The Commission's failure to explain why consummation may now proceed without these conditions is thus a clear violation of the Administrative Procedure Act.

Findings on these issues are not a technicality that can be put off to the future. At stake is the ability of the adversely affected railroads to continue to provide adequate service to the public dependent upon them. Unless the Commission makes findings as to all material issues, it is impossible to determine that the Commission has exercised its powers in accordance with the Congressional mandate. See *Schaffer Transp. Co.* v. *United States*, 355 U.S. 83, 88 (1957).

CONCLUSION

For the foregoing reasons, the decision of the district court denying an interlocutory injunction should be reversed and the order of the Interstate Commerce Commission permitting immediate consummation of the Penn Central merger should be set aside.

Respectfully submitted,

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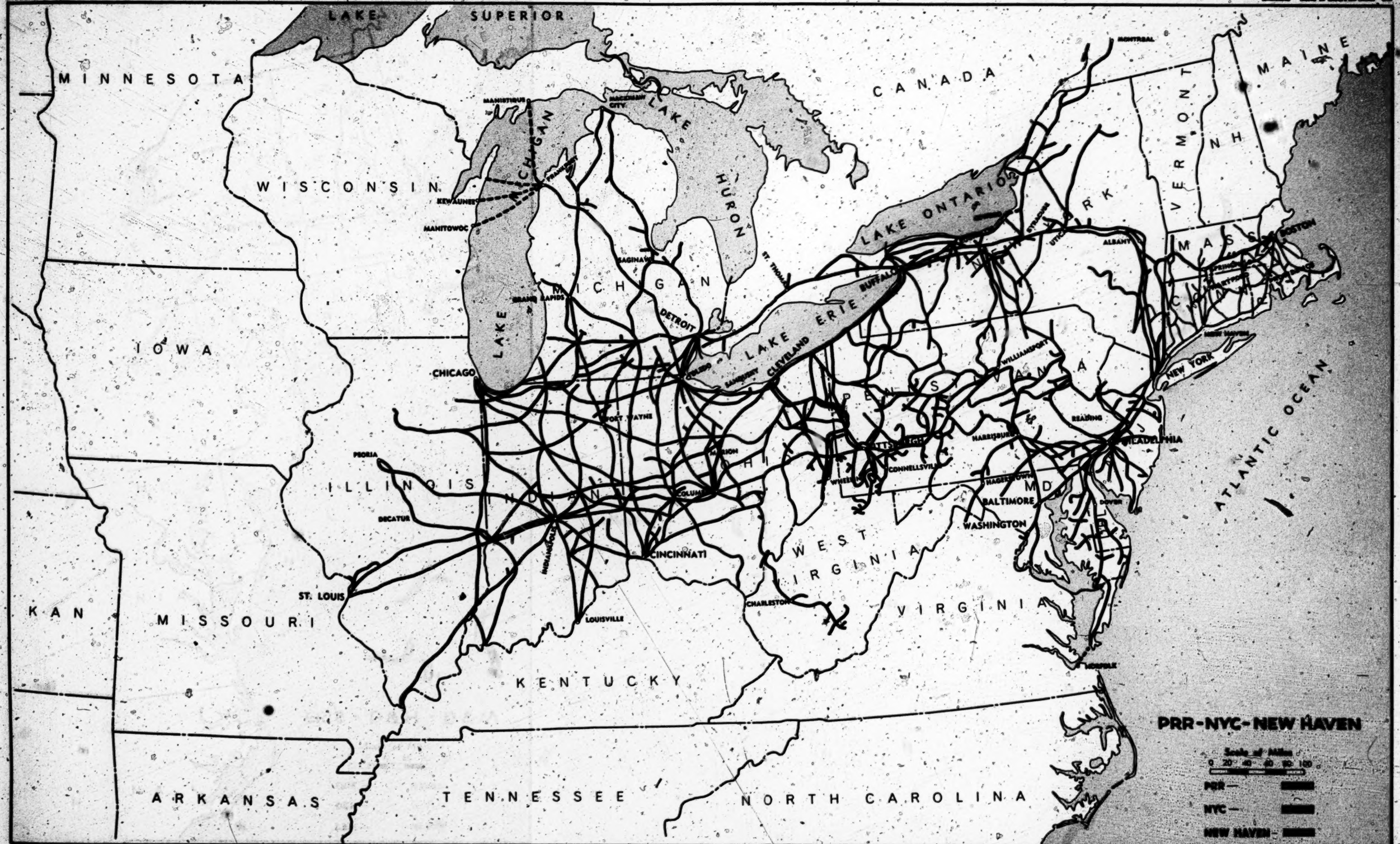
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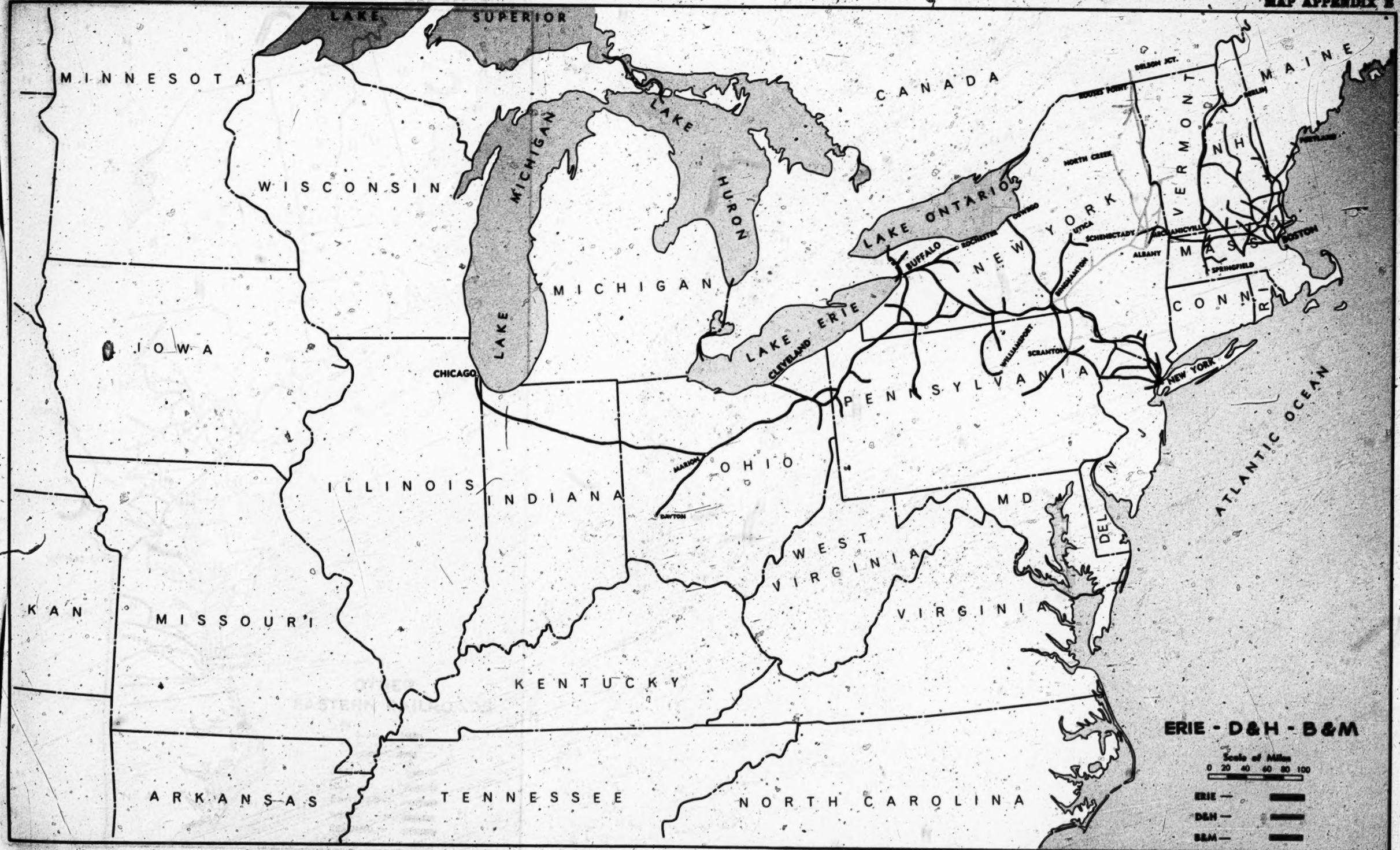
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OTHER EASTERN RAILROADS

Scale of Miles
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